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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1605

RICHARD NIXON,

Appellant,

—v.—

ADMINISTRATOR OF GENERAL SERVICES, *et al.*,

Appellees,

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS *et al.*, JACK ANDERSON, LILLIAN HELLMAN, *et al.*,

Intervenor-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

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Pursuant to Rule 16 of the Rules of this Court, appellees Lillian Hellman, et al., 1/ hereby move to dismiss

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1/ Lillian Hellman is an author and playwright who serves as co-chairman of the Committee for Public Justice, a public interest group concerned about issues of civil rights and civil liberties. Shortly after an agreement was signed on September 8, 1974 between appellant Nixon and the then

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the appeal herein, or in the alternative, to affirm the judgment and order of the district court. The grounds for this motion are (1) that the questions upon which the decision of the case depends are so insubstantial as not to need further argument; or (2) that the district court adequately and correctly determined the issues herein and that further delay would defeat the important objectives of the

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Administrator of General Services, Arthur Sampson, purporting to grant Mr. Nixon ownership and possession of 42 million White House documents and tape recordings, Miss Hellman and other members of the organization (consisting of editors, writers, historians, and lawyers) instituted a Freedom of Information Act suit in the district court, Hellman v. Sampson, C.A. No. 74-1551, to gain access to the materials at issue. (This was one of three related FOIA cases referred to in this litigation as the "consolidated cases.") When the appellant, Mr. Nixon, commenced this action, Miss Hellman et al. moved to intervene as defendants, since the Justice Department, which was representing GSA, had opposed their FOIA claims and had taken a narrow and antagonistic position concerning the scope of government control of Presidential materials. In addition, Mr. Nixon's suit was closely related to the consolidated cases in which proceedings had been virtually completed. The district court granted the motion for intervention.

legislation which is challenged in this case.

ARGUMENT

POINT I

NO SUBSTANTIAL QUESTION IS PRESENTED SINCE APPELLANT NIXON HAS SUFFERED NO INJURY, AND MAY NEVER BE INJURED, BY THE LEGISLATION IN QUESTION

Appellant Nixon is attacking the provisions of the Presidential Recordings and Materials Preservation Act, P.L. 93-256, 88 Stat. 1695; 44 U.S.C. §2107, note, 3315-24 (December 19, 1974). The Act, signed into law by President Ford on December 19, 1974, superseded the Nixon-Sampson agreement referred to above and directed the General Services Administration ("GSA") to obtain possession of all tape recordings of conversations occurring in the White House or other offices used by Mr. Nixon and all "presidential historical materials." Section 101(a) and (b). The Administrator was directed by the statute to issue regulations covering public access to the materials, taking into account various factors. These included the need to provide the public with the full truth of governmental abuses associated with "Watergate"; the need to protect any party's opportunity to assert a legally or constitutionally

based right or privilege which would limit access to materials which have general historical significance; and the need to allow Mr. Nixon and his family to retain all other materials not related to Watergate and not of general historical significance. Section 104(a).

Under the Act, GSA was required to submit its proposed regulations to Congress within ninety legislative days. Either House then had the power to disapprove. Section 104(b). The Senate exercised this disapproval power on September 11, 1975 (121 Cong. Rec. §15803-08, daily ed. September 11, 1975). A revised set of regulations was later submitted to Congress. GSA sought to withdraw these following the district court decision in this case. 2/ As of this moment, no regulations have yet taken effect.

It is entirely possible that GSA and Congress, guided by the district court decision below, will take into account some if not all of Mr. Nixon's complaints and will issue final regulations which protect all of the rights that he claims are being infringed. As the district court noted:

> Objections he now presses

2/ See S. Rep. No. 94-748, 94th Cong. 1st Sess. (1976); S. Rep. 428, 94th Cong. 1st. Sess. (April 8, 1976).

> might be mooted by regulations that might protect the very rights whose infringement he now alleges; hypothetical horrors paraded before us as abstract possibilities might never come to pass under the regulations finally placed in effect. 408 F. Supp. at 336.

Even if the regulations do not meet all of Mr. Nixon's objections, Section 105(a) provides for swift judicial review of the final regulations. Any alleged constitutional infirmity in these regulations can presumably be corrected. And review by this Court would be more appropriate when the regulations crystallize potential problems in final form so that any possible injury to Mr. Nixon can be clearly revealed. Thus, it is difficult to see how the Act on its face can be said to violate any of Mr. Nixon's rights. His claim that the statute is facially invalid is clearly insubstantial.

POINT II

NO CONSTITUTIONAL RIGHT OF MR. NIXON IS VIOLATED BY THE STATUTE

Mr. Nixon relies upon five separate constitutional grounds as a basis for his claim that the Act is facially unconstitutional. He alleges that the Act: (1) violates the principle of separation of

powers between Congress and the Presidency; (2) abridges his Presidenital privilege recognized by this Court in United States v. Nixon, 418 U.S. 683 (1974); (3) violates his constitutionally based right to privacy; (4) infringes upon his rights of association and speech protected by the First Amendment; and (5) amounts to a violation of equal protection since no other President has been subject to the seizure of his materials.

The arguments on separation of powers, Presidential privilege and equal protection have been more than adequately dealt with by the district court below and in the Motion to Affirm filed in this action by the Reporters Committee for Freedom of the Press, et al. Appellees hereby adopt the arguments on those matters presented by the Reporters Committee and will not further burden the Court with respect to those issues.

In view of appellees' particular concern with civil liberties, however, they feel obliged to make a more detailed response to Mr. Nixon's claim that his right to privacy and his First Amendment rights are violated by the Act in question.

The Right to Privacy: Mr. Nixon cannot claim that he had any "reasonable expectation of privacy" with respect to the conduct of his office. This Court has stated that government officials must always be prepared to give "an accounting of their use or abuse of their public trust." Uniformed Sanitation

Men v. Sanitation Commissioner, 392 U.S. 280, 284 (1968). Under those circumstances, no government official no matter how high can reasonably expect that he can hide his use or abuse of governmental powers from scrutiny either during his tenure or after his term of office has expired. The grant of governmental office carries with it an obligation to account to the citizens for the conduct of the office. No precedent, no matter how long established, can support a claim that ex-Presidents may hide from public view the manner in which they served as chief executive. In short, no tape or document dealing with Mr. Nixon's conduct of his office can be protected from public access on the ground that he "reasonably expected" that he could withhold that material from the people he served.

To the extent that Mr. Nixon claims that conversations with his wife, children, lawyer or minister may be included within the materials at issue, he is protected from public disclosure in at least two separate ways: (1) the Act does not purport to seize these materials; and (2) a common-law privilege will protect intimate materials not related to the Presidency. It is true that because of the possible co-mingling of materials some examination of documents or tapes must be made by an archivist to determine in which category a particular document may fall. But such a determination by a professional archivist has been required with respect to the Presidential materials

of all the recent chief executives. See the district court discussion below at 408 F. Supp. at 365 and n. 60.

Free Speech and Association: Mr. Nixon's claim that his First Amendment rights will be violated by the Act can only be characterized as bizarre. An ex-President has no First Amendment right to hide his conduct in office from the people. Rather, the people have a First Amendment right to an accounting from him, since, as this Court has held, "the right to the public to receive suitable access to social, political . . . and other ideas and experiences . . . may not constitutionally be abridged. . . . [The goal of the First Amendment is] producing an informed public capable of conducting its own affairs." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969). See also Kleindienst v. Mandel, 408 U.S. 753, 762-763 (1972).

The Act protects the First Amendment rights of Mr. Nixon as a citizen but not as chief executive. See 408 F. Supp. at 368, n. 65. In any event, there is no indication at this time before any regulations have been issued that Mr. Nixon's political or associational rights will be infringed. And the basis of Mr. Nixon's First Amendment right--namely that his inconsistent political stands will be disclosed making it more difficult for him to engage in political activity in the future --is simply too unreal and speculative to

serve as the basis for any relief.

CONCLUSION

For the reasons stated above, appellees Lillian Hellman, et al., respectfully submit that the questions are so insubstantial as not to need further argument, and the appellees respectfully move this Court to dismiss the appeal, or in the alternative to affirm, summarily.

Respectfully submitted,

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